committed *or* any vehicle or other article, the property of the accused, by means of which such offence has been committed." To hold that the word "or" here is to be construed disjunctively would mean that the Court, in the present case for example, had to elect either to order confiscation of the rice *or* to order confiscation of the sampan, but that it could not order the confiscation of both. If that had been the intention of the legislating authority I should have expected it to have conferred upon the Court a "discretion", or to have used some similar term. And I am of the opinion that it was the clear intention of the legislating authority, in using the word "or" where it first appears in the words "*or* any vehicle or other article", that it should be construed conjunctively, and to give the Court the power to confiscate both the article in respect of which the offence was committed *and* any vehicle or other article.

The ground of appeal which complains that the two charges comprise one offence does not now arise because I have already held that there is no sufficient evidence to support the conviction on the first charge. But I agree with Mr. Ess that the charges should have been framed in the alternative.

There remains the question of whether the sentence of 6 months rigorous imprisonment on the second charge is excessive. The maximum sentence for this offence is a fine not exceeding $5,000 or imprisonment for 2 years, or both. Having regard to all the circumstances of this case, I do not consider that the sentence of 6 months rigorous imprisonment was unreasonable.

The Order will therefore be :—

(1) that the conviction and sentence on the first charge is quashed.

(2) that the order for confiscation of the sampan is quashed.

(3) that the conviction and sentence on the second charge is confirmed.

Order Accordingly.

LOW BEE HOE (w) v. MORSALIM

AND

GOH TIEN LIM v. LEE ANG CHIN.

[App. Civil Juris. (Worley, J.) November 2, 1946]

Landlord and Tenant — Increase of Rent (Restriction) Ordinance 1939, Section 8, Proviso (a) — Rent must be fourteen days in arrear at the date of the issue of the Summons for the proviso to apply — Tender of rent before date of issue of Summons — Finding of fact based on alleged custom that rent is payable in advance, where there is no deposit, held to be wrong — No such custom proved — Whether acceptance of rent after notice to quit can constitute waiver of such notice where tenant is a statutory tenant — Claim for mesne profits — Whether there can be a claim for double rent under Section 15 of the Civil Law Ordinance against a Statutory tenant — Whether notice of intended defence under the Increase of Rent (Restriction) Ordinance must be given under Order 15, Rule 6 (1) (e) of the District Court Rules.

These were two separate appeals from the Civil District Judge, Singapore, which were dealt with on appeal in one judgment, as similar questions of law arose in them.

In the first case, the landlord claimed possession of the ground floor of No. 204, Queen Street, Singapore, which had been let to the tenant at $30/- a month this sum including an unspecified amount for light and water. The landlord also claimed $60/- as arrears of rent for March and April 1946 and mesne profits at the rate of $30/- a month from the 1st of May 1946 until delivery of the premises. It appeared that on the 11th of April 1946 the tenant sent to the landlord a money order for $30/- being the rent for March 1946. This was refused by the landlord on the 15th of April and on that day a notice to quit was served expiring on the 31st of May. To this the tenant replied on the 17th of April denying that he was in arrears of rent for March and April and alleging that when the rent for March fell due on the 15th of that month he had tendered it to the landlord who refused to accept it. With his letter he sent $60/- in payment of rent for March and April and stated his intention to refuse to vacate the premises. On the 24th of April the landlord returned the $60/-. On the 20th of May the tenant sent to the landlord $30/- cash as rent for May. On the 4th of June the landlord accepted the May rent and also the $60/- previously refused stating that this acceptance was without prejudice to his bringing ejectment proceedings. The tenant remained in possession after the month of May and on the 20th of June 1946 the landlord took out a summons in the District Court under Section 60 of the Courts Ordinance. The matter came before the Civil District Judge for hearing on the 30th of July. The crux of the case was whether the rent was payable in advance on the first day of each month as alleged by the landlord or on the fifteenth day as alleged by the tenant. The District Judge found as a fact that the June rent was payable on the 1st of June, one of his reasons for coming to this conclusion being that in his view there was a definitely recognised custom in Singapore in the case of monthly tenancies where there is no express agreement as to the date of payment that, where a deposit has been paid, rent is payable in arrear, but that, where no deposit has been paid, each month's rent shall be payable in advance on the 1st day of the month. The District Judge found therefore that the rent was 14 days in arrear by the 20th of June 1946, when the summons was taken out, and so proviso (a) to Section 8 of the Increase of Rent (Restriction) Ordinance could be relied on by the landlord. He therefore gave judgment for the landlord and ordered that the tenant should give up possession on or before the 15th day of September 1946 and that the landlord should recover from the tenant $105/- being mesne profits from the 1st of June to the 15th of September at $30/- a month and costs. The tenant appealed against this judgment.

Held, that the alleged custom of paying rent in advance was wrongly imported into the case, as it was clear that it cannot satisfy the definition of custom and such a practice ought not to be taken as general and binding upon parties in the absence of evidence that they have agreed to follow it, and therefore the finding of fact in favour of the landlord could not be supported.

Held, also on the other points argued (**obiter**): (1) that the acceptance after expiry of a notice to quit of rent accrued due for a period not going beyond the date of expiration of the notice, does not constitute a waiver of that notice;

(2) that in any case, the rule or supposed rule of the common law that a landlord, who accepts rent accruing due after the expiry of a notice to quit, thereby waives that notice, can have no application in cases where the tenant remains in possession by virtue of the provisions of the Increase of Rent (Restriction) Ordinance; and

(3) that the material date for the purposes of Proviso (a) to Section 8 of the Increase of Rent (Restriction) Ordinance is the date of issuing the summons and if the landlord proves that at the time of the issue of the summons the rent was in arrear for fourteen days no subsequent tender before the date of hearing will avail the tenant.

In the second case, the facts were as follows: The landlord let the premises to the tenant on a monthly tenancy at $40/- a month calculated by the Chinese calendar. Rent was payable in advance. From the 11th moon of the last Chinese year the tenant fell into arrear with his rent and on the 11th of March 1946, he being then four months in arrears, was given notice to quit expiring on the last day of the 3rd Chinese moon (30th April). A few days later the tenant paid to the landlord's solicitors four months rent that is, the rent due to the end of the 2nd Moon (approximately to the end of February). Subsequently the rent for the 3rd Moon was paid in advance on the 3rd April. On the last day of the 3rd moon, namely the 30th April, the tenant tendered rent for the fourth moon in advance. This was the date of the expiry of the notice to quit and the landlord refused to accept the rent. The landlord took out a summons for possession and this summons was issued on the 17th of May. In the summons the landlord also claimed double rent for the tenant holding over on the premises from the 1st day of May till the date of judgment at the rate of $80/- a month. The tenant did not file any notice of statutory defence. It was argued in the District Court that if the tenant intended to rely on the Increase of Rent (Restriction) Ordinance, he ought to have given notice of it as required by Order 15 rule 6 of the District Court Rules and that as he had failed to do so the Ordinance became irrelevant to the case before the Court. The District Judge gave judgment for the tenant and against this judgment the landlord appealed.

Held, (1) that Section 12 of the Increase of Rent (Restriction) Ordinance requires that every Court shall, so far as is necessary, conform to the Ordinance in all proceedings between landlords and tenants, or in which their rights and remedies are in question, and therefore proceedings affecting premises which come under that Ordinance, are covered by the proviso to Order 15, Rule 6 (1) (e) of the District Court Rules which provides that nothing therein shall entitle the plaintiff to maintain an action contrary to the provisions of any statute;

(2) that the material date for the purposes of proviso (a) to section 8 of the Increase of Rent (Restriction) Ordinance is the date of the issue of the summons and if rent in arrears has been tendered by the tenant before the date of the summons, the proviso will not apply;

(3) that Section 15 of the Increase of Rent (Restriction) Ordinance excludes the operation of sub-section (4) of Section 13 of the Civil Law Ordinance and therefore the claim for double rent was misconceived.

Cases referred to :—

(1) *Harpushad v. Sheo Dyal* (1876) L.R. 3 I.A. 259.

(2) *Price v. Worwood* (1859) 28 L.J. 329.

(3) *Hartell v. Blackler* (1920) 2 K.B. 161.

(4) *Hunt v. Bliss* (1919) W.N. 331.

(5) *Davies v. Bristow* (1920) 3 K.B. 428.

(6) *Beavis v. Carman* (1920) 36 T.L.R. 396.

APPEAL FROM CIVIL DISTRICT JUDGE.

S. C. Goho for the tenant (appellant) in the first case.

Chong Thutt Pitt for the landlord (respondent) in the first case.

F. B. Oehlers for the landlord (appellant) in the second case.

P. de Souza for the tenant (respondent) in the second case.

Cur. Adv. Vult.

Worley, J. : —These were separate appeals from the Civil District Court at Singapore which I propose to deal with in one judgment as similar questions of law arose in both cases, although the facts are different.

I will deal first with Appeal No. 2 of 1946 which was an appeal by the Defendant/Tenant against an order made on 6th August 1946 awarding the Plaintiff/Landlord possession and mesne profits. The landlord claimed possession of the ground floor of No. 204 Queen Street, Singapore which was let to the tenant at $30/- a month this sum including an unspecified amount for light and water. The landlord also claimed $60/- as arrears of rent for the months of March and April 1946 and mesne profits at the rate of $30/- a month from the 1st of May 1946 until delivery up of the premises.

The tenant had been living in the landlord's house for twenty-two months prior to the hearing having taken over the premises from a previous tenant in October 1944. The agreement for the tenancy was an oral one made between the landlord and tenant. It is common ground that the premises are premises to which the Increase of Rent (Restriction) Ordinance applies. On the 11th of April 1946 the tenant sent to the landlord a money order for $30/- being the rent for March 1946. This was refused by the

landlord on the 15th of April and on that day a notice to quit was served expiring on the 31st of May. To this the tenant replied on the 17th of April denying that he was in arrears of rent for March and April and alleging that when the rent for March fell due on the 15th of that month he had tendered it to the landlord who refused to accept it. With his letter he sent $60/- cash in payment of rent for March and April and stated his intention to refuse to vacate the premises. On the 24th of April the landlord returned the $60/-. On the 20th of May the tenant sent to the landlord $30/- cash as rent for May. On the 4th of June the landlord accepted the May rent and also the $60/- previously refused stating that this acceptance was without prejudice to his bringing ejectment proceedings. The tenant remained in possession after the month of May and on 20th of June 1946 the landlord took out a summons in the District Court under section 60 of the Courts Enactment. On the 29th of July the tenant filed a notice of special defence under Order 15 rule 6 (1) (e) of the District Court Rules giving notice that, in addition to any grounds of defence of which he is not required to give notice, he intended on the hearing of the action to give in evidence and rely upon the following grounds of defence :—

(1) that the defendant has tendered payment and that the tender has been accepted and that therefore he was not in arrears of rent on the 20th day of June 1946 the date of the summons.

(2) that by reason of (1) above the defendant is a statutory tenant.

(3) that the plaintiff has waived the notice to quit.

The matter came before the Civil District Judge for hearing on the 30th of July. The crux of the case was whether the rent was payable in advance on the first day of each month as alleged by the landlord or on the fifteenth day as alleged by the tenant. The landlord herself did not give evidence, her son who holds a power of attorney dated the 4th of June 1946 being the only witness for the plaintiff. It appeared from his evidence that during the months of April and May he had acted as his mother's agent in returning the money tendered by the tenant on the 14th of April and in issuing a notice to quit and generally in instructing his mother's solicitors. The landlord's son swore that the first of the month and not the fifteenth was the proper day for payment of rent but it would seem that he formed his belief from the evidence of the counterfoils of the rent receipts. He admitted that when the tenant took over the tenancy from the previous tenant in October 1944 the arrangement had been made with his mother and he did not claim to have been present at his interview. He therefore could not give firsthand evidence of the agreement made, and the best evidence of the agreement, namely the evidence of the landlord herself, was not called. He denied that defendant had tendered rent on the 15th of March. He explained that he prepared the rent receipts in advance and dated them as from the 1st of the month to show that rent was payable on that date, not to show that it was received on that day. The tenant swore that the rent fell due on the 15th of each month and that on the 15th of March he went to the landlord to pay the March rent but she refused it saying her son received the rent so that the next day he offered the rent to the landlord's son who refused it. It was agreed that no deposit was paid.

On this evidence the learned District Judge gave judgment for the landlord and ordered that the tenant should give up possession on or before the 15th day of September 1946 and that the plaintiff should recover from the tenant $105/- being mesne profits from the 1st of June to the 15th of September at $30/- a month and costs. Against this judgment the tenant has appealed.

The plaintiff had to satisfy the Court of the existence of circumstances bringing the case within one of the provisoes to section 8 of the Increase of Rent (Restriction) Ordinance 1939 as amended by the Increase of Rent (Restriction) (Amendment) Ordinance 1941, and in this case the landlord relied upon proviso (a) her case being that rent lawfully due from the tenant was in arrear for 14 days. The learned District Judge took the view that the material date in considering the applicability of proviso (a) is the date of the issue of the summons. I shall refer again to this point but for the present I am confining myself to questions of fact. In order to succeed therefore the landlord had to show that the rent was payable on the 1st of each month. Rent, being in arrear on the day after it is due and unpaid, had clearly become fourteen days in arrear by the 20th of June 1946 if payable on the 1st. Equally clearly it was, though in arrear, not fourteen days in arrear by that date if not payable until the 15th.

In his grounds of decision the District Judge finds as a fact that the June rent was payable on the 1st of June and he sets out his reasons for coming to that conclusion. He records that he was not impressed by the tenant's demeanour in giving evidence and felt that he could place no reliance on it. He regarded the landlord's son as an honest witness but while

accepting his evidence as substantially correct he notes that there is hardly any evidence as to any agreement to pay rent in advance on the 1st of the month. After examining this evidence he concludes, "I accept his evidence that he regarded the 1st as the proper day of payment and dated the receipt to show that but I also accepted defendant's evidence that he does not read English and the plaintiff's attorney does not seem to have taken any effective step to indicate that payment on the 1st of the month was a condition of the tenancy." The learned District Judge does not refer to the absence of the plaintiff who could have given the best evidence of the agreement and he does not appear to have directed his mind to the presumption which he could in the circumstances have drawn under section 115 (g) of the Evidence Ordinance.

But even without the aid of this presumption it is clear that on the evidence alone the learned District Judge would not have been satisfied that the landlord had discharged the onus of proof which was upon her but he goes on :—"In English law I apprehend in the absence of any agreement, express or implied, rent in a monthly tenancy is due on the last day of the month. The question is therefore whether the English Common Law rule is varied by custom or usage. . . . . A short but intensive experience of these matters has however satisfied me that there is nowadays a definitely recognised custom in Singapore in the case of monthly tenancies where there is no express agreement as to the date of payment that, where a desposit has been paid, rent is payable in arrear but that, where no deposit has been paid, each month's rent shall be payable in advance on the 1st of the month, a custom prevailing irrespective of race or races of the landlord and tenant." "Payable in arrear" I take to mean payable at the end of the month.

It is therefore on the existence of this alleged custom that the trial Judge based his finding that the rent was due on the first day of each month and the tenant's first two grounds of appeal are (a) that the plaintiff having failed to establish a contract that the rent of the premises was payable on the 1st of each month judgment should have been given against her and (b) that the District Judge was wrong in bringing into the case his own personal knowledge obtained in some cases only.

I conceive that no authority is needed for the proposition that cases must be decided on the evidence and that the evidence must be such as is relevant and admissible under the Evidence Ordinance, that is, it must be either from admitted documents or the statements of witnesses or be something of which the Court can take judicial notice. Matters of which the Court can take judicial notice are prescribed in the Ordinance but do not include custom. In *Harpushad vs. Sheo Dyal*[1] the Privy Council defined custom as "a rule which in a particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain and reasonable and being in derogation of the general rules of law must be construed strictly." It must be proved as a fact and in the case above cited their Lordships said, "A Judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts." It may well be that there is such a common practice as the District Judge refers to but it is clear that it cannot satisfy the definition of custom and such a practice ought not to be taken as general and binding upon parties in the absence of evidence that they have agreed to follow it. The finding of fact in favour of the landlord cannot be supported without reliance upon this alleged custom wrongly imported into the case.

This point alone would be sufficient to dispose of the appeal but I go on to consider other questions of fact and law which were raised in the argument. What I have to say on these points will necessarily be *obiter dicta* so far as concerns this appeal, but I deal with them as I am informed that there is considerable uncertainly and confusion of thought among the public and practitioners as to the effect of the Increase of Rent (Restriction) Ordinance and that an expression of opinion from this Court may help to clear this away. I am indebted to counsel for the thoroughness and ability with which the argument on these points were presented.

The next point taken on the appeal by the tenant was that the landlord had failed to prove that she had served a proper, valid and legal notice to quit and that such notice, being the basis of all ejectment proceedings, she could not succeed in her action. Mr. Goho for the tenant admitted that this point was not taken in the District Court but maintained that he was nevertheless entitled to take it on appeal. I was not referred to any authorities on this point nor have I consulted any but, in the circumstances of this case, I am not disposed to agree with it. In the correspondence between solicitors which preceded the issue of the summons the receipt of the notice was admitted and no objection was taken to its form: and it was formally admitted in the course of the hearing as the learned District Judge has recorded in his notes. I think therefore that the tenant is now debarred from taking this objection.

The next point was that the landlord's acceptance of the rent for March, April and May 1946 although without prejudice to her right to bring ejectment proceedings was a waiver of the notice to quit and a bar to proceedings for ejectment. I do not know of any authority for the proposition that acceptance, after expiry of a notice to quit, of rent accrued due for a period not going beyond the date of expiration of the notice can be a waiver of that notice and I cannot find any authority for it in the cases to which I was referred. The case most in point is *Price v. Worwood*[2] where Baron Martin said "a receipt of rent to operate as a waiver of forfeiture must be a receipt of rent which has become due after the forfeiture was incurred and the mere receipt of the money afterwards the rent having become due previously is of no consequence and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt." In my view this reasoning applies equally to receipt of rent accrued due prior to the expiry of a notice to quit.

Were it necessary I would hold that in cases where the tenant remains in possession by virtue of the provisions of the Ordinance the rule or supposed rule of the common law that a landlord, who accepts rent accruing due after the expiry of a notice to quit, thereby waives that notice can have no application. Judicial opinion in England has not been unanimous on this point (see *Hartell v. Blackler*[3], *Hunt v. Bliss*[4] and *Davies v. Bristow*[5]) but I think the better view is as I have stated. The reason is that the relationship of the parties on the expiration of the notice is fundamentally changed. As was pointed out in *Davies v. Bristow*, the notice having expired, the landlord can no more waive it than he can waive the effluxion of time: the contractual relationship between the parties is ended but, whereas at common law if there is no fresh agreement between them, (which may if necessary be inferred from the acceptance of rent) the former tenant becomes a trespasser, it is not so when the statute applies. There is then a statutory relationship of which one of the conditions is that the tenant is bound to tender the rent and, so long as he does so and observes the other conditions of the original agreement, the landlord has no option but to accept it. "In accepting rent tendered in circumstances like these the landlord does not prejudice his position or lose the right which he would otherwise have of insisting that the term has come to an end." (per Lush J. in *Davies v. Bristow*). The relationship between the parties being no longer a contractual but a statutory one and the statute not requiring that the landlord, in the event of the tenant failing to comply with the conditions of the Ordinance, should give notice of his intention to avail himself of his statutory remedy, no further notice to quit is required but the landlord may apply without further notice to the Rent Assessment Board or to the District Court according to the circumstances of the case.

The next two points taken in the petition of appeal were (c) the learned District Judge failed to consider that the appellant was a statutory tenant and as such he was protected by the Increase of Rent (Restriction) Ordinance 1939 and from ejectment under all the circumstances of the case.

(d) that the appellant as a statutory tenant could pay the rent any time before filing of the summons for ejectment and if he did so proceedings for ejectment will not lie against him.

The issue here is as to what is the material date for the purposes of proviso (a) to section 8 of the Ordinance. Three alternatives have been suggested:—

(i) that the material date is the date of the issue of the summons (which is the view held by the learned District Judge);

(ii) that, if the statutory tenant is at any time fourteen days in arrear with his rent, the fourteenth day is the material date; the tenant has no further protection under the Ordinance and no tender of rent between the date of falling into arrears for fourteen days and the date of the issue of the summons will avail him.

(iii) that the material date is the date of the hearing, that is, the date when the Court is asked to make the order.

I will deal first with this last proposition which was put forward by Mr. Goho for the appellant in the present appeal. I was referred to a number of English decisions on similar legislation in England but these must be examined with caution as the provisions of the English Acts are not identical with the Ordinance and my first duty is to interpret the Ordinance as it stands. This third proposition might appear to be supported by a passage in *Redman's* Law of Landlord and Tenant 8th Edition page 945 commenting on section 5 (1) of the English Increase of Rent and Mortgage Interest Restrictions Acts 1920 and 1923 which reads as follows:—"It is the state of facts and also the law at the time of making the order which are to be considered in determining whether an order should be made" but if the cases cited in support of this are examined it appears that they are all cases where the question was whether the

Court was satisfied that suitable alternative accommodation was available or whether the Plaintiff reasonably required the premises for himself. Moreover although the general intention of section 5 of the Acts and section 8 of the Ordinance is similar, namely to restrict actions for recovery of possession, yet the method of effecting the purpose is different. The Act prescribes the circumstances in which an order may be made and therefore those circumstances must exist at the time of making the order: the Ordinance first prohibits applications for ejectment, except with leave of the Rent Assessment Board, and then sets out circumstances in which this prohibition shall not apply. I therefore do not consider that the English cases offer any safe guide to the interpretation of proviso (a) to section 8.

As to the second proposition it is true that section 15 requires a statutory tenant who retains possession to observe all the terms and conditions of the original contract of tenancy so far as they are consistent with the Ordinance, and since payment of rent on the due date is one of the terms and conditions of the contract I was disposed to think that a breach of this term would be sufficient to deprive the tenant of his right to retain possession, but I think the governing factor must be the restriction on the landlord's right to apply for possession imposed by section 8.

This section in its essentials reads, so far as concerns these appeals, "no landlord shall apply to any Court for an order for the possession of any premises to which this Ordinance applies provided that this section shall not apply where any rent lawfully due is in arrear for fourteen days." I think that the plain meaning of this is that the landlord is debarred from applying to the Court unless at the time of application the rent is at least fourteen days in arrear.

I am strengthened in this view by a consideration of section 8 as originally enacted in Ordinance No. 35 of 1939 where the proviso read :—

> Provided that this section shall not apply to ejectment for non-payment of rent where rent has been in arrear for fourteen days after it had become due.

That wording might well have supported an argument that it was sufficient to show that the rent had been at any time in arrear for fourteen days. But the change to the present tense in the amendment effected by Ordinance No. 30 of 1941 excludes this argument. I therefore agree with the learned District Judge that for the purposes of this proviso the material date is the date of issuing the summons. The onus is on the landlord to prove circumstances which bring the case within one of the provisoes; but if he proves that at the time of the issue of the summons the rent was in arrear for fourteen days no subsequent tender before the date of hearing will avail the tenant. I adopt the words of Lawrence J. in *Beavis v. Carman*[6]. "There was a right in the landlord to possession when the writ was served and nothing had happened since to get rid of that right and there was no *locus poenitentiae* on the part of the tenant".

The last ground of appeal in this case was that the learned District Judge was wrong in granting mesne profits at $30/- a month when the monthly rent included charges for light and water supplied. This point was not argued and I therefore do not attempt to decide it but mesne profits represent the benefit the tenant has had from the premises and prima facie no apportionment need be made if the landlord's obligations under the contract include the supply of electric current and water for the use of the tenant, and these amenities have been supplied during the relevant period.

I now turn to consider the appeal No. 3 of 1946. In this case the appellant is the plaintiff/landlord and the respondent the defendant/tenant. The landlord's claim as endorsed on the summons reads :—

> The plaintiff claims possession of the back portion of the ground floor of the premises known as No. 7 Muar Road, Singapore, let by the plaintiff to the defendant on a monthly tenancy at a monthly rent of $40/- payable in advance. The tenancy was duly determined by a notice in writing to quit expiring on the 30th April 1946 which was served on the defendant on the 11th day of March, 1946.
>
> The plaintiff further claims $ double rent for the defendant holding over the said back portion of the ground floor of the said premises from the 1st day of May, 1946, till the date of judgment at the rate of $80/- per month.

This appeal is against the order of the learned District Judge dated the 22nd day of August 1946 dismissing the plaintiff's claim and entering judgment for the defendant with no order as to costs.

The facts as set out in the Petition of Appeal and as admitted in argument before me were as follows :—The landlord let the premises to the tenant on a monthly tenancy at $40/- a month calculated by the Chinese calendar. Rent was payable in advance. From the 11th moon of the last Chinese Year the tenant fell into arrear with his rent and on the 11th of March, 1946, he being then four months in arrears,

was given notice to quit expiring on the last day of the 3rd Chinese moon (30th April). A few days later the tenant paid to the landlord's solicitors four months rent that is, the rent due to the end of the 2nd moon (approximately to the end of February). Subsequently the rent for the 3rd moon was paid in advance on the 3rd April. On the last day of the 3rd moon, namely the 30th April, the tenant tendered rent for the 4th moon in advance. This was the date of expiry of the notice to quit and the landlord refused to accept the rent. The summons was issued on the 17th of May. The tenant did not file any notice of statutory defence.

At the hearing the landlord and tenant were both represented by solicitors. The plaintiff's evidence is recorded as follows so far as is material to this appeal: "Defendant my sub-tenant at monthly rent of $40/- payable in arrear tenancy by Chinese month from 1st to last day of each. Rent from 11th moon never paid though demanded by me. Since then June rent collected by my lawyers in all $240/-. On 11th March notice to quit sent by my lawyer requiring him to quit by 29th day of 3rd moon (= 30th April), 4 months rent which was paid a day or two later by defendant's solicitors that is all rent due to end of 2nd moon. Rent for 3rd moon unpaid on 3rd April." On this Mr. De Souza for the tenant submitted he had no case to answer. Mr. Oehlers asked for action to be stayed pending the result of an appeal in another case but judgment was given for the defendant.

The pleadings in the District Court and the Grounds of Decision shew that the landlord's case proceeded on the footing that the rent being in arrear at the date of the notice to quit, the tenancy was terminated by the notice and that, if the tenant intended to rely on the protection of the Increase of Rent (Restriction) Ordinance, he must give notice of it as required by Order 15 rule 6 of the District Court Rules and that having failed to do so the Ordinance became irrelevant to the case before the Court.

I do not agree with this proposition. Order 15 rule 6 (1) (e) requires that where the defendant intends to rely upon a statutory defence or any defence of which he is required by any statute to give notice he shall at the prescribed time before the hearing file a notice of particulars of his ground of defence but the rule further provides that nothing therein shall entitle a plaintiff to maintain an action contrary to the provisions of any statute. In my view proceedings affecting premises which come under the Increase of Rent (Restriction) Ordinance are proceedings to which the proviso applies having regard to section 12 of the Ordinance which requires that every Court shall, so far as is necessary, conform to the Ordinance in all proceedings between landlords and tenants or in which the rights, remedies, *et cetera* of the same are in question. In my view, therefore, while it may be advisable for a defendant to file a notice under the rules, and to pay the amount due if any into Court, nevertheless, if he fails to do so, the Court is put on inquiry as to whether the premises are such as fall within the scope of the Ordinance and, if they do, to satisfy itself whether the order asked for is one which can properly be made having regard to the provisions thereof.

The District Judge felt no doubt that at the time of service of the notice to quit rent lawfully due from the tenant was in arrear for fourteen days and that the landlord relied upon this fact to bring his case within the exception of proviso (a) to section 8. He held however that the material point of time in considering the applicability of the proviso is the date of the issue of the summons and, for the reasons which I have set out above, I concur with his view. I should point out that my remarks on this point are not obiter in this appeal. This disposes of the ground of appeal that the learned District Judge had misdirected himself in so holding.

But the appellant also appealed against the finding of act that the rent was payable in arrear, on the grounds that the rent was payable in advance as pleaded, that plaintiff's evidence ought not to have been accepted against the pleadings as he is illiterate and that the trial Judge should have called for the rent receipts. The appellant also contends that the trial Judge had confused himself as to the amounts of rent paid. It is well recognised that an appellate Court is slow to interfere with findings of fact by a lower Court but I am satisfied that this is a case where the finding of fact ought not to stand. Examination of the plaintiff's evidence and the trial Judge's analysis of it in his Grounds of Decision shows considerable confusion. The reference to the June rent is unintelligible and I hazard the suggestion that it is probably due to the difficulty of concurrent references to Chinese moons and English months and to a confusion in interpretation between "rent for six months" and "rent for the 6th month or moon". Again the landlord was clearly mistaken or wrongly understood as saying that his lawyers had collected in all $240/-. There is another mistake where he is recorded as having said that rent for the 3rd moon was unpaid on

3rd April whereas in fact it was paid on that day. It is certain also that he made a mistake in saying or was wrongly understood to have said that the rent was payable in arrear.

Although I think the finding of fact cannot stand I do not think it necessary to send the case back for retrial as I can dispose of it on the admitted facts and the law. The real issue in the case, it being admitted that the rent is payable in advance and taking the date of the issue of the summons as the material date, was whether the tenant was in arrear with his rent for more than fourteen days on the 17th of May.

On the 30th of April, when the notice to quit expired, the tenant became a statutory tenant under the Ordinance and could remain in possession so long as he observes the terms and conditions of the original contract of tenancy. On that day he tendered rent for the 4th moon in advance but it was refused. If I understood Mr. Oehlers aright his contention was that rent which was tendered but refused was rent which was unpaid and in arrear; that a landlord is entitled to refuse to accept rent from a statutory tenant and after fourteen days may apply for possession under section 60 of the Courts Ordinance, and if the tenant wishes to rely on the statutory protection he must plead it as a special defence, failing which the landlord can stand upon his common law rights. I do not agree with this view. If accepted it would go a long way to nullify the protection which it was the purpose of the Ordinance to confer upon tenants and it takes no account of section 12 of the Ordinance. I have already dealt with the question of filing a notice of statutory defence and the only thing I need add is that a statutory tenant being bound to observe the terms and conditions of the original contract of tenancy, one of which is the payment of rent on the agreed date, I do not see what else he can do but tender the rent on or before that date. So long as he is willing to pay the rent and observe the other conditions of the former tenancy the landlord has no option but to accept the rent.

In my view therefore the tender of the rent for the 4th moon on the 30th of April was a sufficient compliance with the conditions of section 15 of the Ordinance and on the 17th of May there was no rent lawfully due and in arrear for fourteen days and the plaintiff's claim should have been dismissed for that reason.

Two other points raised in the course of the argument remain to be considered. The first is the landlord's claim for double rent. There can be no doubt that since the tenant remained in possession by virtue of the Ordinance this claim was misconceived having regard to the provision of section 15 which, in such a case, excludes the operation of sub-section (4) of section 13 of the Civil Law Ordinance. The other point was Mr. De Souza's submission that in these cases the Court need not exercise its jurisdiction unless it considers it reasonable so to do. In this connection, I think it necessary to point out that, although there is statutory provision to this effect in section 5 of the Rent and Mortgage Interest Restrictions Acts, 1920 and 1923, there is no corresponding provision in section 8 of the Ordinance, and that, when the operation of that section is excluded by reason of one or more of its provisoes, and the jurisdiction of the Court under section 60 of the Courts Ordinance is restored, the rights of the parties must be determined in accordance with the ordinary principles of the common law.

In District Court Appeal No. 2 of 1946 the Appeal is allowed and in Appeal No. 3 the appeal is dismissed. I should like to hear Counsel on the question of costs and on the form the orders should take.

Appeal allowed in the 1st Case.

Appeal dismissed in the 2nd Case.